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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 22-0319

DA 22-0319

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 87

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350 MONTANA, ERIC HUSETH, ABIGAIL HUSETH, and JEROME WALKER,

Plaintiffs and Appellees,

v.

STATE OF MONTANA and NORTHWESTERN CORPORATION,

Defendants and Appellants,

and

THE MONTANA DEPARTMENT OF PUBLIC SERVICE REGULATION, MONTANA PUBLIC SERVICE COMMISSION, and DOES I THROUGH V,

Defendants.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DV-2021-684
Honorable Jason Marks, Presiding Judge

COUNSEL OF RECORD:

For Appellant State of Montana:

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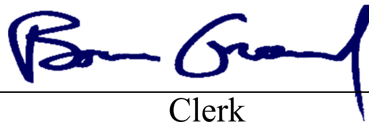

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Section 69-8-421 (2021) of the Montana Code effectively permits NorthWestern Energy but no other public utility to apply to the Montana Public Service Commission (Commission) for preapproval of an electricity supply resource, such as a power plant or battery storage facility.[1] Preapproval allows NorthWestern to acquire an electricity supply resource with assurance that it will be able to include that resource's purchase and initial operational costs when calculating Montanans' electricity bills. Plaintiffs—a climate advocacy group and three NorthWestern ratepayers—challenged the preapproval statute as unconstitutional. Because we conclude that they lack standing to assert the claims of non-party public utilities and that their consumer claims are not ripe, we do not reach the merits of Plaintiffs' constitutional claims and reverse the Fourth Judicial District Court's decision holding otherwise.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Section 69-8-421, MCA, also known as the "preapproval statute," is a product of Montana's deregulation and subsequent reregulation of its electricity market over the last nearly three decades. In 1997, Montana passed the Electric Utility Industry Restructuring and Customer Choice Act. 1997 Mont. Laws ch. 505. The purpose of the act was to open electricity prices to a free market with multiple competing companies. Due to exemptions

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[1] House Bill 284 was signed by the Governor on April 25, 2023. The bill amends § 69-8-421, MCA, to make preapproval available to all public utilities, not just to NorthWestern. Though the amendment is effective immediately, the bill contains no retroactivity clause and does not affect this case's disposition. All references to the statute are to the 2021 version.

for multistate utilities and utilities with fewer than fifty customers, Montana Power Company—then the largest public utility in Montana—was the only utility deregulated by the 1997 Restructuring Act. The act required Montana Power Company to separate its generation resources (e.g., power plants) from its distribution and transmission assets (e.g., poles, wires, and pipes). Its distribution and transmission assets were to become open-access systems that all electricity suppliers could use. Montana Power sold its distribution and transmission assets to NorthWestern and its generation assets to a different company. The Commission still regulated distribution and transmission but lost the ability to regulate generation.

¶3 Montanans' electricity bills surged after deregulation. In 2003, the Legislature attempted to redress the problem, passing legislation that included the precursor to the preapproval statute. 2003 Mont. Laws ch. 509. The 2003 legislation created a "default supplier" of electricity, required the Commission to regulate the default supplier's electricity-supply purchases, and allowed the default supplier to apply for advanced approval of such purchases. Again, due to exemptions for other utilities, the law applied only to NorthWestern.

¶4 In 2007, the Legislature closed the chapter on deregulation by passing the Electric Utility Industry Generation Reintegration Act. 2007 Mont. Laws ch. 491. The act was intended to reintegrate the industry and allow NorthWestern to own generation resources, regulated by the Commission. Part of the 2007 Reintegration Act was codified in amendments to § 69-8-421, MCA, the preapproval statute at issue in this case. That statute

was amended to allow a public utility "that removed its generation assets from its rate base . . . prior to October 1, 2007," to apply to the Commission "for approval of an electricity supply resource that is not yet procured . . . ." A rate base is the value of property on which a utility may earn a specified rate of return from customers. Given the preapproval statute's limitation to utilities that removed generation assets from their rate bases prior to October 1, 2007, the parties do not dispute that the statute applies solely to NorthWestern, because NorthWestern's predecessor, Montana Power Company, was the only public utility that removed its generation assets from its rate base before that date.

¶5 Preapproval operates differently from the ordinary rate-case procedure to acquire an electricity supply resource. Typically, when a utility acquires an electricity supply resource, that utility first purchases the resource and then, after beginning operations, applies to the Commission to recover its costs from customers through electricity rates. Preapproval, on the other hand, allows a utility to acquire an electricity supply resource already authorized to pass the purchase and initial operational costs on to Montana customers. Under the statute applicable here, NorthWestern may pursue either procedure, but other utilities, such as Montana Dakota Utilities Company, Black Hills Power, and Avista—all of which serve customers in Montana—may pursue only a rate case.

¶6 In May 2021, NorthWestern applied to the Commission for preapproval of two electricity supply resources. The first was a 50-megawatt battery storage facility to be constructed and owned by Beartooth Energy Storage in Yellowstone County (Beartooth Battery Project). The second was a 175-megawatt natural gas power plant, to be

constructed in Laurel and owned by NorthWestern (Laurel Gas Plant). NorthWestern maintained that it needed the resources to increase capacity to serve customers during peak energy-usage times.

¶7 Shortly after NorthWestern filed its application, 350 Montana—a climate advocacy group dedicated to reducing atmospheric carbon dioxide concentrations to less than 350 parts per million—and three individual NorthWestern ratepayers filed a complaint requesting declaratory judgment that the preapproval statute was unconstitutional. Plaintiffs asserted that the statute violated two provisions in the Montana Constitution: Article II, Section 31, prohibiting an irrevocable grant of special privileges; and Article V, Section 12, prohibiting a special act when a general act can be made applicable. The Plaintiffs also sought an injunction preventing the Commission from preapproving NorthWestern's two projects. Plaintiffs named NorthWestern, the State of Montana, and the Commission as defendants.

¶8 NorthWestern moved to dismiss the lawsuit for lack of standing and ripeness. The District Court denied the motion, reasoning that Plaintiffs had alleged a direct economic injury "in the form of increased rates for utility services by operation of the pre-approval statute which [they] allege[] violates constitutional prohibitions against special privileges or franchises and special acts." The court further concluded, without expounding, that the economic injury was traceable to NorthWestern's utilization of the preapproval statute. NorthWestern argued that the two constitutional provisions did not grant Plaintiffs standing, but the court concluded that the provisions "can be understood generally as

prohibiting the Legislature from enactments conferring economic advantages on preferred parties. In this matter, Plaintiffs allege economic injuries resulting from a legislative enactment, the pre-approval statute, conferring economic advantages on NorthWestern." Finally, the court concluded that the threat of economic harm to Plaintiffs was ripe for review. Although the Commission had not yet decided NorthWestern's application, the court determined that the record was adequate for judicial review because "the question presented is largely a question of law," and the court favored the efficiency in "addressing constitutional issues sooner rather than later."

¶9 After the District Court's decision, NorthWestern withdrew its application and filed a new application for preapproval of only the Beartooth Battery Project. Between the withdrawal and new filing, the parties submitted cross-motions for summary judgment in the District Court. Six months later—after NorthWestern had filed its new application and after hearing oral argument—the court held that § 69-8-421, MCA, violated the constitution under both provisions Plaintiffs identified. The court reasoned that a public utility other than NorthWestern may desire to seek preapproval but would not be eligible and thus concluded that the statute granted NorthWestern an unconstitutional special privilege of preapproval. Mont. Const. art. II, § 31. The court also concluded that the statute was a special act because it excluded all utilities but NorthWestern and because a general act could be made that would grant all utilities the right to seek preapproval. Mont. Const. art. V, § 12.

¶10 NorthWestern and the State appeal the District Court's invalidation of the preapproval statute; the Commission does not separately appeal.

STANDARD OF REVIEW

¶11 We review issues of justiciability, such as standing and ripeness, de novo. *Reichert v. State*, 2012 MT 111, ¶ 20, 365 Mont. 92, 278 P.3d 455.

DISCUSSION

¶12 *Issue One: Do Plaintiffs have standing to challenge the preapproval statute?*

¶13 NorthWestern argues that Plaintiffs do not have standing to assert constitutional claims on behalf of non-party electric utilities. Plaintiffs counter that they have standing to seek declaratory relief in the face of threatened, personally suffered economic harm in the form of their increased utility bills.

¶14 Montana courts, like federal courts, may decide only justiciable controversies. *Bullock v. Fox*, 2019 MT 50, ¶ 27, 395 Mont. 35, 435 P.3d 1187. This limitation prevents courts from issuing decisions about purely political or theoretical disputes. Several doctrines enforce the requirement for a true dispute, including the standing doctrine. Standing is a threshold requirement in every case. *Bullock*, ¶ 28. Standing asks whether the plaintiff asserting a complaint is the proper party to bring that matter to court for adjudication. *Larson v. State*, 2019 MT 28, ¶ 45, 394 Mont. 167, 434 P.3d 241.

¶15 Our cases identify two complementary standing inquiries. The first is the case-or-controversy requirement imposed by the Montana and United States Constitutions. *Bullock*, ¶ 30 (citing Mont. Const. art. VII, § 4(1) and U.S. Const. art. III, § 2). To bring a

case or controversy, a plaintiff must allege "a past, present, or threatened injury to a property or civil right," and such injury must be redressable through court action. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80. "[A] general or abstract interest in the constitutionality of a statute . . . is insufficient for standing absent a direct causal connection between the alleged illegality and specific and definite harm personally suffered, or likely to be personally suffered, by the plaintiff." *Larson*, ¶ 46.

¶16 The second standing inquiry comprises several prudential considerations imposed by judges. *Bullock*, ¶ 28. For example, courts should consider the importance of the question to the public and "whether the statute at issue would effectively be immunized from review if the plaintiff were denied standing." *Heffernan*, ¶ 33 (citing *Gryczan v. State*, 283 Mont. 433, 446, 942 P.2d 112, 120 (1997)). Another prudential limitation is that the injury generally must be personally suffered by the plaintiff. *Heffernan*, ¶ 32; *see Baxter Homeowners Ass'n v. Angel*, 2013 MT 83, ¶ 15, 369 Mont. 398, 298 P.3d 1145 (describing the narrow third-party exception, not applicable here, to the requirement that injuries be personally suffered).

¶17 For example, in *Jones v. Montana University System*, we held that political candidates lacked standing to assert claims on behalf of Montana youth after the candidates were excluded from a debate. 2007 MT 82, ¶ 50, 337 Mont. 1, 155 P.3d 1247. The general rule prohibiting third parties from asserting constitutional rights on behalf of others applied. *Jones*, ¶ 49. Similarly, in *In re B.F.*, we held that a mother filing for termination of

guardianship of her child did not have standing to assert a violation of the purported fathers' statutory and constitutional rights. *In re B.F.*, 2004 MT 61, ¶ 16, 320 Mont. 261, 87 P.3d 427. Even if the purported fathers' rights were violated, the mother did not suffer a personal detriment or injury as a result. *In re B.F.*, ¶ 16.

¶18 In this case, the District Court appears to have considered—and at times conflated—two alleged injuries: 1) the unfair advantage over other utilities that § 69-8-421, MCA, creates by allowing only NorthWestern to acquire electricity supply resources via preapproval; and 2) the NorthWestern ratepayers' consumer injury created by that statutory advantage. The District Court erred to the extent it concluded that Plaintiffs were proper parties to assert the first injury. The exclusion of other utilities from the preapproval process is a potential injury that another utility conceivably could assert. But any unfair disadvantage that the statute creates for other utilities—none of which are or have been parties to the case—is not an injury that is personal to Plaintiffs.

¶19 Plaintiffs do have standing, however, to assert their own direct economic injury as ratepayers by alleging that such injury is a result of NorthWestern's access to preapproval as opposed to the typical rate-case procedure.[2] Economic injury caused by, or likely to be caused by, an alleged illegality can confer standing. *Larson*, ¶ 46; *see also Helena Parents*

[2] The District Court concluded that 350 Montana had associational standing to assert the economic injury claims of its members, stating, "Mitigation of economic injury to Plaintiffs in the form of imposition of rate increases to pay for new gas-fired facilities is germane to the association's stated purpose." As the State discusses in its reply, the subsequent withdrawal of the Laurel Gas Plant application may call 350 Montana's associational standing into question. Because the issue is not necessary to our conclusion today, however, we decline to address it.

Comm'n v. Lewis & Clark Cty. Comm'rs, 277 Mont. 367, 373-74, 922 P.2d 1140, 1143-44 (1996) (citing the Uniform Declaratory Judgment Act). If the alleged economic injury is premised on the violation of constitutional or statutory rights, then standing depends on whether the constitutional or statutory provision can be understood to grant persons in the plaintiff's position a right to judicial relief. *Mitchell v. Glacier Cty.*, 2017 MT 258, ¶ 11, 389 Mont. 122, 406 P.3d 427. Such an economic injury is evident in Plaintiffs' complaint, in which they allege that the preapproval statute "shifts the risk of absorbing imprudent and unreasonable costs in the acquisition of an electricity supply resource from the directors and shareholders of [NorthWestern] to its ratepayers" and "removes the incentive for NorthWestern to control costs and incentivizes it to increase costs to obtain the profit guaranteed by law." This allegation of threatened harm to consumers in the form of higher electricity bills is minimally adequate to confer Plaintiffs with standing to assert the claim. But it does not answer the ripeness question, to which we turn next.

¶20 *Issue Two: Are Plaintiffs' consumer claims ripe for adjudication?*

¶21 NorthWestern argues that Plaintiffs' economic injury claims were not ripe for adjudication when the District Court issued its summary judgment order because the Commission had not decided NorthWestern's preapproval application. Plaintiffs counter that withholding judicial review on the issue will inflict economic hardship on Plaintiffs. Plaintiffs emphasize the District Court's determination that this case presents mostly pure questions of law and thus is more likely to be ripe for review.

¶22 Ripeness is another justiciability doctrine with constitutional and prudential considerations. *Reichert*, ¶ 56. Ripeness can be viewed as a time dimension of standing, asking "whether an injury that has not yet happened is sufficiently likely to happen or, instead, is too contingent or remote to support present adjudication." *Reichert*, ¶ 55. "The basic purpose of the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Reichert*, ¶ 54. We have emphasized that a prudential component of ripeness is "whether there is a factually adequate record upon which to base effective review." *Reichert*, ¶ 56.

¶23 For example, in *Advocates for School Trust Lands v. State*, we held that a claim was unripe because adjudication depended on the development of additional facts about whether future State application of the statute at issue would reduce the value of state trust lands. 2022 MT 46, ¶ 26, 408 Mont. 39, 505 P.3d 825; *see also Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 25, 333 Mont. 331, 142 P.3d 864 (a newspaper's request for prospective relief was not ripe because no identifiable person had been denied access to a particular document); *cf. Mitchell*, ¶ 36 ("Taxpayers have not made concrete allegations that the County squandered a specific amount of money that it would need to recoup through increased property taxes.").

¶24 Here, the substance of Plaintiffs' remaining alleged injury is that the preapproval process for the Beartooth Battery Project—as opposed to a typical rate case available to all utilities—is an unconstitutional special act or privilege that will cause Plaintiffs' electricity bills to rise. In other words, for Plaintiffs' case to succeed they must demonstrate that the

preapproval process itself, as compared to a typical rate-case process, will increase their utility bill costs. Such issues are fact-intensive and not purely questions of law. As the record stands now, these factual issues have not been developed. The complaint contains economic injury estimates based largely on the Laurel Gas Plant and no information about rate comparisons from the proposed battery storage facility. The record contains little regarding the Commission's consideration of NorthWestern's refiled application on the battery project, though it is undisputed that this litigation put a halt to the Commission's proceedings before it had entertained the merits. *See* § 69-8-421(6)(a), MCA (the Commission has discretion to "approve or deny, in whole or in part, an application for approval of an electricity supply resource"); § 69-8-421(6)(c), MCA (requiring the Commission to find that approval is in the public interest and that all charges are reasonable and just). Moreover, Plaintiffs' contention that the Commission's previous preapproval of NorthWestern's applications for coal- and gas-fired plants, a wind project, and a hydroelectric facility supports the ripeness of their claim is not convincing. It appears the Commission has not previously approved rate recovery for a battery asset, and Plaintiffs fail to demonstrate or argue relevant similarity of other projects to the Beartooth Battery Project. Plaintiffs' case is not ripe because the factual record regarding NorthWestern's refiled application is inadequate for effective review of the substance of the claim. *See* *Reichert*, ¶ 56.

¶25 Finally, contrary to the District Court's preference for efficiency by considering the constitutional claims now, we adhere to the principle that courts should avoid constitutional

issues whenever possible. *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 62, 338 Mont. 259, 165 P.3d 1079. Due to the demonstrated lack of ripeness and in accordance with our doctrine of constitutional avoidance, the District Court should not have considered Plaintiffs' constitutional challenge to § 69-8-421, MCA.

CONCLUSION

¶26 Plaintiffs' challenge to the preapproval statute is not justiciable because they lack standing to raise the rights of non-party utilities and because their alleged consumer injuries are not yet ripe for consideration. We accordingly reverse the District Court's summary judgment order invalidating § 69-8-421, MCA.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE